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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 88

M. DORSKY,

Petitioner,

vs.

BRADLEY G. BROWN, LICENSE INSPECTOR,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mr. Dorsky, Respectfully Petitions this Honorable Court for a Writ of Certiorari directed to the Supreme Court of the State of Alabama.

Question Presented

Whether a state privilege or license law, which attempts to levy a license tax on each coin-operated radio receiving set is violative of and repugnant to the Commerce Clause of the Constitution of the United States (R. 32, No. 12).

Summary Statement of Matter Involved

The Petitioner, M. Dorsky, instituted this proceeding in the Circuit Court, in Equity, of Jefferson County, Alabama, against Bradley G. Brown, as License Inspector of Jefferson County, Alabama, the respondent, seeking a declaratory judgment as to the constitutional validity of the privilege tax or license imposed on each coin-operated radio receiving set by Act 688, of the General Acts of the Regular Session of the 1947 Legislature of Alabama. The petition also sought an injunction restraining Brown from collecting the tax imposed by said Act 688 on such radios (R. 3). The pertinent and applicable part of said Act No. 688 is as follows:

> "Sec. 613. *Vending Machines*—For each machine for vending gum, candy, soft drinks, ice cream, coffee, pop corn, food of any kind, drink of any kind, pencils, handkerchiefs, combs, drinking cups, cigarettes or other tobacco products, or other articles of merchandise, and for each machine for use in testing strength or grip, shining shoes, making or developing photographs, recording the voice or other sound, and each coin-operated radio, and each coin-operated machine by which a person is weighed, and each coin-operated machine for use in entertainment or skill, and each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much (Music) transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business: $1.00 for each machine that may be operated by pennies: $8.00 for each machine that may be operated by nickels or coins of a larger denomination; and a separate license shall be issued for each such machine that may be operated by pennies, nickels, or coins of a larger denomination, which license shall be prominently displayed on or immediately near to such machine; except that hotels,

motels, tourist camps, or other places of business having less than five (5) coin-operated radios, $8.00; and for each such radio in excess of four (4) $2.00 each;—Provided further that no license shall be required under this section for home type merchandise vending machines placed in private homes for home use only and not for public use;—"

The cause was submitted on the bill of complaint as amended and on agreed statement of facts (R. 26-28). The Court entered a decree denying generally the relief prayed for.

The petitioner duly and legally appealed from said decree to the Supreme Court of Alabama (R. 29).

The Supreme Court of Alabama (majority opinion) rendered March 1, 1951 affirmed the decree of the lower court (R. 33).

The dissenting opinion of Mr. Chief Justice Livingston which sufficiently stated the facts and the point of law involved, held the attempt to impose an occupational tax on coin-operated radios to be unconstitutional and void (R. 36-42).

It was agreed that the coin-operated radios involved were installed in guest rooms of the Molton, Bankhead and Thomas Jefferson Hotels in Birmingham, Alabama; that they were owned and serviced by petitioner, M. Dorsky; that the coin-operated radio when in use is plugged into the wall socket in the same manner as any floor lamp or home radio. The insertion of a coin in a slot turns on the electric current and permits radio reception. It was further agreed that similar radios without the coin slot, in which a key turned the current on, were used in similar hotels and were not subject to any license tax; and, further, that the hotels paid the privilege tax on all rooms in hotels. It was agreed that the user of such radio had no control over the programs received (R. 26-28).

Jurisdictional Statement

United States Supreme Court Rule 38, Section 5 (a) provides for a review by the Supreme Court of the United States "where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court".

Petitioner contends that, under the provisions of United States Supreme Court Rule 38, there are special and important reasons why the writ of certiorari be granted in this case, in that the courts of last resort of the State of Alabama have decided substantial Federal questions not theretofore determined by this Court or in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

Reasons Relied On for the Allowance of the Writ

Communications by radio constitute interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat 1, 6 L. Ed. 23; *Fishers Blend Station, Inc.* v. *Tax Comm.* 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956.

The tax here involved is levied on the business of operating instrumentalities of reception. No attempt is made in the tax act (supra) to apportion the tax or to separate intrastate communications from interstate communications and to levy the tax on intrastate communications only.

Radio receiving sets are essential instrumentalities of interstate commerce. *Station WBT* v. *Poulnot,* 46 F. 2nd 671, cited in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250; 58 S. Ct. 546, 82 L. Ed. 823, 115 ALR 944. If the reception of interstate communication can be taxed in Alabama, the same communications received in other states may be taxed there also.

Interstate Commerce cannot be taxed directly by the States. *Freeman* v. *Hewit,* 329 U. S. 249, 67 S. Ct. 274, 276,

91 L. Ed. 265, also *Joseph, Comptroller* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422, 67 S. Ct. 815, 819, 91 L. Ed. 993.

> "What makes the tax invalid is the fact that there is interference by a state with the freedom of Interstate Commerce."

The questions presented involve Federal questions of importance worthy of consideration by the Supreme Court of the United States.

Prayer for Writ

WHEREFORE, Your petitioner prays that a writ of certiorari issue by this Honorable Court to the Supreme Court of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court; that the final decree of the Supreme Court of Alabama may be reversed; and that your petitioner be granted such other and further relief in the premises as to this Honorable Court may be deemed just and proper.

Respectfully submitted,

JOHN S. TUCKER, JR.,
J. PAUL MEEKS,
Frank Nelson Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Supreme Court of Alabama is reported in the Advance Sheet of the Southern Reporter, Vol. 51 (2nd) pp. 360 to 363, inclusive.

The dissenting opinions of Mr. Chief Justice Livingston is reported in Advance Sheet of Southern Reporter, Vol. 51 (2nd) pages 363 to 366, inclusive. Pertinent parts of the opinions are shown on Pages 33-43, inclusive, of the Record.

Jurisdiction

The jurisdiction of this Court, is invoked under the provisions of Section 237 (b) of the United States Judicial Code as amended by Act of Feb. 13, 1925. The courts of last resort of the State of Alabama have decided a substantial claim of Federal constitutional right adversely to petitioner, in a way not in accordance with the applicable decisions of this court (United States Supreme Court Rule 38).

Statement of the Case

A summary of the facts is given in the petition, pages 2 to 3 inclusive. The petitioner challenges the validity of a privilege or occupational tax imposed by an act of the Legislature of Alabama on radio receiving sets having a coin-slot, on the grounds that such radio receiving set is an instrument of Interstate Commerce, and the tax is invalid as violative of the commerce clause of the Federal Constitution (Article 1, Section 8, Cl. 3 of the Constitution of the United States).

Argument

Petitioner waives all arguments, and assignments of errors, etc., presented in the lower courts excepting those

pertaining to the validity of such tax on radio receiving sets as an instrument of interstate commerce, or violative of the Constitution of the United States.

In holding that a privilege or occupational tax on such radio receiving sets is valid, the Supreme Court of Alabama (majority opinion) cited its opinion in the *Sanford* v. *City of Clanton* case reported in 31 Ala. app. 253, 15 So. 2nd 303 and 15 So. 2nd 309,—"which is the prevailing rule on the question in this jurisdiction". Subsequent to this decision, the Supreme Court of the United States apparently has overruled the *Sanford* v. *City of Clanton* case. *Spector Motor Service, Inc.* v. *O'Connor,* 71 S. Ct. 508. In this case the Supreme Court of the United States held that under the commerce clause, a state cannot levy a tax upon the privilege of carrying on a business that is exclusively *interstate in character,* no matter how fairly the tax is apportioned to business done within the state.

In this case, as it was in the *Spector Motor Service* case, the tax is not collected in lieu of an ad valorem property tax; it is not a fee for an inspection or a tax on sales or use. It is a tax or excise placed—for the privilege of carrying on interstate commerce.

The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the State. *Freeman* v. *Hewit,* 91 L. Ed. 265, 329 U. S. 249, 67 S. Ct. 274, 276, *Joseph Comptroller* v. *Carter & Weekes Stevedoring Company,* 330 U. S. 422, 67 S. Ct. 815, 819, 91 L. Ed. 993.

These radios are all located in hotel rooms where privilege licenses are imposed and collected on each hotel room. There is no element of police inspection involved; the ether waves over which the radio sounds travel is regulated under Federal laws. Congress has preempted this field. *Station WBT* v. *Poulnot* reported in D.C. 46 F. 2nd 671.

The *WBT* v. *Poulnot* case (*supra*) is the only authority on the questions of a state tax on radio receiving sets, and it was held that the radio receiving sets were absolutely essential instrumentalities of interstate commerce, and that the State of South Carolina had no right to levy a license tax on the privilege of owning and operating a radio receiving set in that state.

In the case of *Fishers Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, 56 S. Ct. 608, 610, 80 L. Ed. 956, the U. S. Supreme Court held that a state occupation tax on the receipts of an owner of a radio station from broadcasting programs to listeners within and without the state was invalid.

Simpson v. *Shepard*, 230 U. S. 352, 400, 57 L. Ed. 1511, 33 S. Ct. 729, 48 LRA N.S. 1151.

Where interstate and intrastate commerce are served by the same instrumentalities, a tax applied directly to the privilege of doing the local business may in fact burden the related interstate business.

Pacific Teleph. U. Teleg. Co. v. *Tax Commission*, 297 U. S. 403 80 L. Ed. 760, 56 S. Ct. 522, 105 ALR 1.

Sprout v. *South Bend*, 277 U. S. 163, 72 L. Ed. 833.

> *"The distinction is whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce."*

It is again reiterated that the radio receiving sets owned by petitioner should not be subject to the state privilege license tax.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Supreme Court of Alabama should be granted.

Respectfully submitted,

JOHN S. TUCKER, JR.,
J. PAUL MEEKS,
Frank Nelson Building,
Birmingham 3, Alabama,
Counsel for Petitioner.

APPENDIX "A"

THE SUPREME COURT OF ALABAMA (MAJORITY) OPINION SAID:

" • • • we are not convinced that later cases of the Supreme Court of the United States have detracted from the pertinent principles enumerated in that case (*Sanford* v. *City of Clanton,* 31 Ala. App. 253, 15 So. 2nd 303), which is the prevailing rule on the question in this jurisdiction. Therefore, until there is a clearer pronouncement by the United States Supreme Court on the subject, we prefer to rest on the rule in the Sanford case as controlling.

"We are not convinced beyond reasonable doubt that the statute is unconstitutional and, therefore, affirm the decree of the lower court in so holding."

Mr. Chief Justice LIVINGSTON dissenting:

"But in our opinion that part of Section 613, supra, (ACT 688 of General Acts of 1947 Alabama Legislature, General Acts 1947, page 522, Title 51, Section 613, Pocket Part, Code of Alabama 1940), which attempts to levy a license tax on "each coin-operated radio" is violative of the commerce clause of the Constitution of the United States."

"The tax here involved is levied on the business of operating instrumentalities of reception rather than the business of broadcasting. No attempt is made in Section 613, supra, to apportion the tax or to separate intrastate communications from interstate communications and to levy the tax on intrastate communications only. So in that respect, we are bound to consider the levy as one on interstate communications, or on the business of operating instrumentalities used in interstate communications."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 96.

M. DORSKY,
Petitioner,

vs.

BRADLEY G. BROWN, as License Inspector of Jefferson County, Alabama,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Attorney General of the State of Alabama,

H. GRADY TILLER,
Legal Counsel, Department of Revenue of the State of Alabama, and Assistant Attorney General,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 88.

M. DORSKY,
Petitioner,

v.

BRADLEY G. BROWN, as License Inspector of Jefferson County, Alabama,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Alabama (Record pp. 33 through 43, inclusive) is reported at 51 So. 2d 360 (51 So. 2d Advance Sheet No. 4, April 26, 1951). Also see **Sanford v. City of Clanton**, 31 Ala. App. 253, 15 So. 2d 303, certiorari denied 244 Ala. 671, 15 So. 2d 309.

JURISDICTION.

It is the respondent's contention that there is no question of interstate commerce or a Federal question involved in this case in that the license here involved is imposed upon a purely local business; thus it is respectfully submitted that this Court has no jurisdiction to entertain this cause.

QUESTIONS PRESENTED.

The Supreme Court of Alabama by a majority of five justices has construed the license which is imposed by Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183 (Act No. 688, General Acts of Alabama 1947, page 522), as affecting, in this case, only the local business activities of the petitioner, and as not in any way offending the commerce clause of the Federal Constitution. The questions presented, therefore, are:

1. Whether or not the petitioner is carrying on a purely local and intrastate business in installing, maintaining and operating coin-operated radios in certain hotels located within the city limits of Birmingham, Alabama.

2. Whether or not the license levied by the State of Alabama on the operators of vending machines offends the commerce clause of the United States Constitution when applied to coin-operated radios installed in the guest rooms of certain hotels located exclusively within the city limits of Birmingham, Alabama.

STATUTE INVOLVED.

The statute involved is Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183 (Act No. 688, General Acts of Alabama 1947, page 522), which is a business or occupational license imposed by the State of Alabama on those persons who are engaged in the business of maintaining and operating in the places described in the statute, vending or coin-operated machines.

STATEMENT.

This cause originated as a suit instituted by the petitioner, M. Dorsky, in the Circuit Court, in Equity, of Jefferson County, Alabama, against Bradley G. Brown, as

License Inspector of Jefferson County, Alabama, the respondent, seeking a declaratory judgment as to the constitutional validity of the license imposed on those persons who are engaged in the business of maintaining and operating in hotels, motels, tourist camps, or other places of business, in Alabama, coin-operated radios, among the other vending or coin-operated machines also described in the statute. Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183 (Act No. 688, General Acts of Alabama 1947, page 522).

The bill of complaint also sought an injunction restraining Brown from collecting the license imposed by Section 613, supra, as affecting coin-operated radios. Under the agreed statement of facts (Record pp. 26 through 28D, inclusive), it is shown that the petitioner, M. Dorsky, is a resident of the City of Birmingham, County of Jefferson, State of Alabama. He is also the owner of a number of coin-operated radios or vending machines, a diagram of which was attached to the agreed statement of facts in this cause as Exhibits "A", "B", "C" and "D" (Record pp. 28A, 28B, 28C and 28D). He made a business through contracts with certain hotels located within the city limits of Birmingham, Jefferson County, Alabama, namely, the Molton, Bankhead and Thomas Jefferson Hotels (Record p. 27), of installing in the guest rooms of those hotels such coin-operated radios or vending machines. The contracts also provided that the petitioner, Dorsky, was the owner and operator of these coin machines, that he was to install them in the rooms, and keep them in repair. The hotel companies were to furnish a place for the coin-operated radios in certain of their guest rooms in said hotels, to furnish the electric current for their operation, and to protect them while they were installed in their guest rooms. The petitioner, Dorsky, was to receive as his part under the contracts, seventy-five per centum of the receipts from said coin machines, and the hotels were to receive twenty-

five per centum of the receipts. This, therefore, constituted a joint venture or enterprise on the part of the petitioner, Dorsky, and the three hotels, which was to be conducted within the city limits of the City of Birmingham, Jefferson County, Alabama. There is no evidence in this case that such business enterprise, or the activities carried on by either of the parties to said contracts, in carrying out said contracts, ever transcended the boundaries of the City of Birmingham, Alabama, much less those of the State of Alabama (Record p. 27).

These coin-operated machines, or coin-operated radios, can be made to play only by a person (presumably a guest of the hotel) first purchasing a sufficient amount of electric current to play the radio by inserting a twenty-five cent piece into the coin slot located on the left-hand side of the cabinet which houses both the coin-slot device and the radio, and is shown by Exhibit "A" to the agreed statement of facts (Record p. 28A), and the symbols designated in such exhibit as "T-230" and "T-231." As long as the radio is enclosed in the cabinet and connected with the coin-slot machine, it cannot be played at will, but only after the electric current has been caused to flow by a person first depositing the required coin in the coin slot located on the cabinet, and designated as "T-231," and then by pressing down the push lever located near the slot, and designated as "T-230," which trips the lever and releases the coin. This then automatically switches on the electric timer contained in the machine, which causes the electric current to flow into the radio, in order to allow the radio to be played. This still does not turn on the radio, as that requires an entirely separate operation, which is controlled by the switch connected to the radio itself and designated as "L-104." After the coin has been deposited in the slot, and the lever which starts the electric timer released, and the radio is turned on by a separate operation, then the radio plays like any other radio. The opera-

tor may, by using the knob on the right, dial all of the stations located in Birmingham, Alabama, and probably some stations located without the state. The only limitation being that the electric timer attached to the coin device is set for only two hours, or for some other short period of time, and when such time has expired, it automatically cuts off the electric current. This prevents the radio from being played again until the customer puts another twenty-five cent piece in the coin slot, and presses the push lever. In other words, these coin-operated machines are not like ordinary radio receiving sets as the petitioner seems to contend, but are, when enclosed in the cabinet and connected with the coin-slot machine, as is shown in Exhibits "A" and "B" to the agreed statement of facts (Record pp. 28A and 28B), coin-slot vending machines which are maintained and operated by the petitioner, Dorsky, as a commercial venture and business for profit, exclusively in the limits of the City of Birmingham, Alabama.

The coin-slot device and the radios used in these machines, while enclosed within one cabinet, are clearly separate units, either of which may be disconnected and removed from the cabinet for repairs or other purposes without removing the other (Record pp. 28A and 28B). When the radio is disconnected from the coin-slot device, it can be played like any other radio. When connected with the coin-slot device it cannot be played like an ordinary radio, but only after a twenty-five cent piece has been deposited in the coin slot which automatically starts the timer and starts the electric current to flowing again. It is only when the coin-slot machine is connected with the radio that such mechanism is affected by the license, and then as a vending machine or coin-operated machine and not as a radio receiving set (Record pp. 26, 27, 28, 28A and 28B). The coin-operated radio, when in use, is plugged into the wall socket in the same manner as a floor lamp or other

movable electric device. The only difference being that the electric current will not flow into the coin-operated radio until the slot machine has been started by the deposit of the required coin in the slot.

This cause was originally submitted on the bill of complaint, and bill of complaint, as amended, the respondent's answer, and an agreed statement of facts (Record p. 29). The Circuit Court, In Equity, of Jefferson County, Alabama, entered a decree which denied generally the relief prayed for by the petitioner, Dorsky, and, accordingly, upheld and sustained the validity of the license statute complained of by the petitioner (Record p. 29).

Several grounds were assigned by the petitioner in his bill of complaint, and bill of complaint, as amended, raising the question of the constitutionality of said Section 613, supra, but only one of such grounds attempted to raise a Federal question, or attacked the license on the grounds that it offended the Constitution of the United States.

The petitioner in his argument (Petition and Brief, page 6) has waived all arguments and assignments of errors presented in the lower court, except those relating to the alleged Federal question, or to the validity of such license as imposed on those persons who are engaged in the business of maintaining and operating in the places described in the statute coin-operated radios, which are alleged by the petitioner to be instruments of interstate commerce. The respondent consequently will confine his argument in this case to such alleged Federal question.

The Supreme Court of the State of Alabama, in an opinion entered on March 1, 1951, affirmed the decree and judgment of the lower court (51 So. 2d 360, 362); and has also held that the license here involved is valid and constitutional, by a per curiam opinion of five of the Justices. Only one of the Justices, the Chief Justice, dissented (Record pp. 33 through 43, inclusive).

ARGUMENT.

I.

There Is No Federal Question Involved, as the Petitioner Is Carrying on a Purely Local Business.

The license under consideration, Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183 (Act No. 688, General Acts of Alabama 1947, page 522), is a business or occupational license imposed on those persons who are engaged in the business of maintaining and operating, in the places described in the statute, vending or coin-operated machines. It contemplates purely local activities within the State of Alabama. It is not a tax, as the petitioner seems to argue, directly on radio receiving sets or even directly on coin-operated radios.

Section 613, supra, was originally Schedule 154 of the 1935 Alabama License Act, Regular Session 1935, General Acts of Alabama 1935, pages 441, 504. The 1935 License Act expressly provided in its first or introductory paragraph that the licenses described in its various schedules were business, occupational or privilege licenses, which were to be levied as follows:

> "Section 348. Every person, firm, company, corporation, or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license, and a County license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act."

Schedule 154, or what is now Section 613, supra, in its original form read as follows:

> "Schedule 154. For each machine for vending gum, candy, cigarettes or other articles: Where machine is operated by pennies, three dollars ($3.00). Where machine is operated by nickels or coins of a larger denomination, four dollars ($4.00). Provided no license shall be issued for a machine vending cigarettes, or other articles for the retail of which a license is otherwise herein provided, until the person operating the place of business in which said vending machine is located or the owner of said machine shall have first paid for and obtained a license as provided under Schedule 32. Any person operating or permitting the operation of a vending machine dispensing packages or in quantities less than a package, cigarettes or any articles on which there is an excise tax without first having paid the tax thereon by affixing the required stamp to the original package as required under Schedule 159 shall be guilty of a misdemeanor and punished as provided in said schedule for failure to pay said tax."

The statute comprising Schedule 154 was amended during the 1936-37 Special Session of the Alabama Legislature, and again during the 1945 General Session. Those amendments, however, do not appear to be pertinent to this case. It was not until the 1947 Amendment, Act No. 688, General Acts of Alabama 1947, page 522 (now Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183), that the Alabama Legislature included coin-operated radios among the other vending or coin-operated machines described in this license statute.

The statute, as last amended, now reads as follows:

> "§613. **Vending Machines.**—For each machine for vending gum, candy, soft drinks, ice cream, coffee,

pop corn, food of any kind, drink of any kind, pencils, handkerchiefs, combs, drinking cups, cigarettes or other tobacco products, or other articles or merchandise, and for each machine for use in testing strength or grip, shining shoes, making or developing photographs, recording the voice or other sound, **and each coin-operated radio**, and each coin-operated machine by which a person is weighed and each coin-operated machine for use in entertainment or skill, and each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much [music] transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business: $1.00 for each machine that may be operated by pennies: $8.00 for each machine that may be operated by nickels or coins of a larger denomination; and a separate license shall be issued for each such machine that may be operated by pennies, nickels, or coins of a larger denomination, which license shall be prominently displayed on or immediately near to such machine; except that hotels, motels, tourist camps, or other places of business having less than five (5) **coin-operated radios, $8.00; and for each such radio in excess of four (4) $2.00 each;** $8.00 for each location, establishment, or place of business receiving transmitted music by wire or cable, except that such locations, establishments, or place of business having less than five (5) transmitters or speakers $8.00 and for each such transmitter or speaker in excess of four (4) $2.00 each; provided that one license may be issued to include all coin-operated radios and/or transmitters or speakers located within such hotel, motel, tourist camp, location, establishment, or other place of business, which license shall be prominently displayed. **The licenses herein provided for shall be levied upon the operator**

of the machine, the coin-operated radio, or the central point or studio from which point or studio the music is transmitted; provided, however, that in the event any unlicensed machine, coin-operated radio, transmitter or speaker is found in any establishment or place of business, the operator of such establishment or place of business shall be conclusively presumed to be the operator of such machine, coin-operated radio, transmitter or speaker and shall be liable for the license therefor. Provided that nothing in this section shall apply to machines installed by any person, firm or corporation, nor to coin-operated gas meters, nor to coin-operated telephones, nor to machine vending postage stamps in its place of business vending necessary articles on a non-profit basis for emergency use only by the employees of such person, firm or corporation. Provided that no license shall be required under this section where a privilege or dealer's license is required by this chapter for the sale of such articles and such privilege license shall have been obtained by the person, firm or corporation operating the place of business where such machine is located, or the owner of such vending machine shall have secured such privilege license as required herein. Provided, further, that no license for vending machines, vending merchandise in industrial plants or on private property for use of employees, or machines on which persons are weighed, shall be required, if in lieu thereof, the person, firm or corporation engaged in the business of operating such machine shall have applied for and obtained an occupational license and shall have paid therefor, as follows: In counties of sixty thousand inhabitants or less—thirty dollars. In counties of sixty thousand and one and not exceeding one hundred and twenty-five thousand inhabitants—sixty dollars. In counties of one hundred and twenty-five thousand and one inhabitants and over—eighty dollars. Any person

operating or permitting the operation of a vending machine dispensing packages or in quantities less than a package of cigarettes, or any article on which there is an excise tax the payment of which is evidenced by stamps, without first having paid the tax thereon by affixing the required stamps to the original package as required under section 718 of this title shall be guilty of a misdemeanor and punished as provided in such section for failure to pay said tax. Each vending machine vending tobacco products of any kind whatsoever shall have securely affixed thereto in full view the name and address of the legal owner of said machine. The privilege license required by law or the vending machine license issued to cover vending machines shall be securely affixed in full view to each such vending machine before said machine is placed in operation or use. Provided that when tobacco products of any kind whatsoever are found in such vending machines to be improperly stamped or unstamped, in violation of Section 718 of this title, such vending machine and contents shall be confiscated by any duly authorized agent of the department of revenue as provided in section 718 of this title, for the confiscation of improperly stamped on (sic) unstamped tobacco products. Each vending machine vending tobacco products of any kind whatsoever shall have a transparent front window, or windows, through which the Alabama revenue stamps required by section 718 of this title may be seen without the necessity of opening or unlocking the vending machine. Provided further that for the purpose of any excise or consumption taxes the payment of which is not evidenced by stamps, levied on any of the articles dispensed through such machine, the person in whose place of business each machine is located shall be considered the consumer of such article and shall be liable for such taxes measured by the regular retail price thereof. **Pro-**

vided further that no license shall be required under this section for home type merchandise vending machines placed in private homes for home use only and not for public use; provided further that nothing herein contained shall be construed as legalizing or licensing any machine or device which is now illegal or which may hereafter be declared illegal; provided further that all the licenses levied by this section shall bear the business address of the owner or operator thereof; it being the legislative intent that only one state and one county license shall be required for the operation of a vending machine under this section within this state for any one license year. Provided further the license shall be purchased in the county in which the machine is located or in operation on October 1st or at the time license is purchased for the licensing year. (Ib.; 1936-37, Ex. Sess., p. 32; 1939, p. 519; 1943, p. 185, appvd. June 22, 1943; 1947, p. 522, appvd. Oct. 7, 1947.)" (Emphasis ours as to pertinent parts of the statute.)

It can be clearly seen by considering the historical background of this license that it is not a tax on radio receiving sets or even coin-operated radios, but is a privilege license imposed on those persons who are engaged in the business of maintaining and operating vending or coin-operated machines in the places designated by the statute. This is expressly provided in the statute, as amended:

> "The licenses herein provided for **shall be levied upon the operator** of the machine, **the coin-operated radio,** or the central point or studio from which point or studio the music is transmitted; * * *."

The "operator" of an automatic slot machine used for the purpose of delivering goods, wares or merchandise, so as to be liable for the license tax on such machine levied by the ordinance of the City of St. Louis, is the person,

firm or corporation who exercises the privilege of managing or conducting the machine. **Edmonds v. City of St. Louis,** 156 S. W. 2d 619, 622, 348 Mo. 1063.

The act imposing a tax on gross deposits placed in coin-operated music boxes or machines reflects the legislative intent to classify as "operators," to whom the act applies, persons owning such machines placed for use on the premises of others as well as the occupier of the premises. 68 O. S. Supp. 1943, Sections 1541-1544. **Oklahoma Tax Commission v. Allcott,** 154 P. 2d 973, 975, 195 Okl. 99.

In the pinball machine business an "operator" is one who purchases the machine from either a distributor or a jobber and then arranges with so-called location owners to place the machines on the premises of the location owners. **Seaboard N. Y. Corp. v. Wallander,** 80 N. Y. S. 2d 715, 717, 192 Misc. 227.

It should, however, be noted that where the statute refers to the central point or studio from which the music is transmitted, it is not referring to coin-operated radios but is, rather, referring to that part of the statute which relates to "* * * each coin-operated machine on which music is played, and each location, establishment, or place of business receiving much [music] transmitted by wire or cable from any central point or studio whether such point or studio is situated within or without such location, establishment, or place of business: * * *." This is an entirely different device or machine from a coin-operated radio, and is clearly separated therefrom in the descriptions contained in the statute, and in the grammatical make-up of the statute. The phrase "coin-operated radios" whenever used in the statute is separated by commas and is referred to therein as a separate entity apart from the other devices also described in the statute.

It is true that when a person does come within the scope of the statute and becomes subject to the license for the

privilege of engaging in the activities described therein, the amount of the license is measured or determined by the number of vending or coin-operated machines which he maintains in a certain establishment or establishments. The measure of the license, however, is an entirely separate and distinct thing from the privilege sought to be licensed. In accordance with the expressed wording of the statute itself, the license is imposed upon the operator of the coin-operated machines, or the person who is engaged in the business of maintaining and operating the machines in the places described in and by the statute.

The coin-operated machines thus are used as a medium to measure the amount of the license, and are not, as such, directly subject to the license, and certainly not any direct tax. It then follows that not even by the widest stretch of the imagination can it be said that under the provisions of Section 613, supra, the Alabama Legislature has attempted to tax or license radio receiving sets.

Under the agreed statement of facts (Record pp. 26 through 28D, inclusive) it is admitted that all of the vending machines or coin-operated radios involved in this case were maintained and installed by the petitioner, Dorsky, in hotels situated in the heart of the City of Birmingham, Jefferson County, Alabama. The business venture which was entered into under the contracts between the petitioner, Dorsky, and these Birmingham hotels, provided that he was to furnish the coin-operated radios, maintain, operate, and keep them in repair. The hotels, namely, the Molton, Bankhead and Thomas Jefferson Hotels, were, on their part, to allow the petitioner to install the coin-operated radios in certain of their guest rooms, to furnish the electric current necessary to operate them, and to protect them while so installed. For his part, the petitioner, Dorsky, was to receive seventy-five per centum of the receipts from said coin-operated machines and the hotels

were to receive twenty-five per centum of the receipts from such machines.

It is hardly necessary to state that the City of Birmingham, Jefferson County, Alabama, is located practically in the center of the State of Alabama and far removed from the boundaries of the State. And it can be safely said that none of the business activities of the petitioner or said three hotels, insofar as they relate to the coin-operated radios here involved, transcend the boundaries of the State of Alabama. These coin-operated machines are all maintained, installed and operated within the city limits of Birmingham, Alabama, and the profits received therefrom are earned, received, and disbursed accordingly.

It is very difficult to see then how it can be said, under such undisputed facts or by any logical interpretation thereof, that the petitioner is engaged in interstate activities or in interstate commerce. If he is not engaged in a purely local business, then it is very hard to see how the line of demarcation can ever be drawn between what is a purely local business and what constitutes interstate activities, or sufficient interstate activities to constitute engaging in interstate commerce.

Interstate commerce has been generally defined as all commercial intercourse between different states and all the component parts of that intercourse. The term is not a technical legal conception, but a practical one drawn from the course of business, and what falls within it must be determined upon consideration of established facts and known commercial methods. See **Utah Power & Light Co. v. Pfost,** 52 S. Ct. 548, 286 U. S. 165; **Federal Trade Commission v. Pacific States Paper Trade Asso.,** 47 S. Ct. 255, 273 U. S. 52, and Am. Jur., Vol. 11, Pg. 8, Sec. 4.

In the case of **United States v. Hill,** 39 S. Ct. 143, 248 U. S. 420, the Court held as follows:

> "Importation into one state from another is the indispensable element, the test, of interstate commerce."

The petitioner's activities in installing, maintaining, and operating these vending machines or coin-operated radios solely within the City of Birmingham, Alabama, do not even come close to meeting the test as applied in these recognized definitions of interstate commerce.

The fact seems inescapable that the petitioner is engaged in a purely local business, entirely separable from interstate commerce. It is, consequently, respectfully submitted that there is no Federal question involved and that the matters herein contained present questions of a purely local nature.

II.

The License Involved Is Levied on the Operators of Vending Machines or Coin-Operated Slot Machines, and Not on Radio Receiving Sets.

The historical background of the license statute complained of by the petitioner, and the fact that the license levied by Title 51, Section 613, Code of Alabama 1940, as amended, 1949 Cumulative Pocket Part, page 183 (Act No. 688, General Acts of Alabama 1947, page 522), is an occupational or business license imposed on those persons who are engaged in the business of installing, maintaining, and operating in the places described in the statute vending machines or coin-operated radios, has been discussed at some length under the foregoing Topic I of this brief and argument.

It is also well to note that the Supreme Court of Alabama has in this case (51 So. 2d 360, 362), in upholding the validity of the statute under Section 45 of the Constitution of the State of Alabama, and in holding that Act No. 688,

supra, the amendment here involved, had a proper title, also held that these coin-operated radios are vending machines, like the other coin-operated slot machines which are described in said statute.

The fact that the coin-operated radios are vending machines or coin-operated slot machines was not a novel question for the Court to decide, for in somewhat similar cases, the Federal Circuit Court of Appeals for the Third Circuit has made similar rulings as to coin-operated gas meters. See **McCaughn, Collector of Internal Revenue, v. American Meter Company**, 67 F. 2d 148; also 72 F. 2d 871.

In the **McCaughn** cases, supra, the Circuit Court of Appeals for the Third Circuit had before it the question of whether or not the taxpayer's gas meter was, under the Revenue Acts of 1918 and 1921 [40 Stat. 1122, §900 (16), and 42 Stat. 292, §900 (11)], an "automatic, slot-vending machine." The facts of that case are to the effect that the taxpayer made a patented device adapted to operate a release when a coin is dropped in its slot. The device when soldered, as was intended should be done, to a gas meter, a quarter dollar deposited in its slot, released and delivered to the depositor of the coin two hundred and fifty feet of gas. The Court, in discussing the case, observes as follows:

> "To answer the question whether such apparatus was an 'automatic slot-vending machine,' we take these four words and ascertain their common everyday meaning. Is the apparatus a machine? Assuredly so, for the dictionary defines a machine as 'any combination of inanimate mechanism for utilizing or applying power.' **In the use of the present device we have two parties—a seller and a buyer; the commodity—gas; the quantity desired—two hundred fifty feet; the price—25 cents.** Without the agency of either party, the device automatically receives the money from the buyer and holds it for the seller, automatically measures the product, automatically delivers it to the

buyer. The sale is effected by a slot which receives the coin of the buyer; by gravity takes it out of the control of the buyer; and by gravity puts it in control of the seller; and at the same time releases the bargained amount of gas and delivers it to the buyer. The contract, sale, delivery, and payment are all effected by mechanism, automatically, and without any working human agency.

"Such terms as 'slot machine,' as an agency for selling small articles, 'nickel in the slot,' were in common use and clearly defined in the public speech in this type of selling agencies. **Presumably, Congress used these words and terms in their common everyday meaning and consequently there is no uncertainty in the statute. Vending is a synonym for selling. It is a mere abstraction now to say that the transaction here involved was a license, a permit, a privilege of using gas, and not a sale of a commodity. Where, as here, the words of a statute are clear and unambiguous, there is no call for testimony or reasoning to attribute some imaginary meaning to them. The facts show that the device in question works automatically, that it is a machine, that it is a selling machine, a product delivery machine, and a price collecting machine; that it does away with human control, agency, work, and exercise of will power. What was meant and effected was a slot-made sale. We hold, therefore, that it is an 'automatic slot-vending machine' and comes within the statutes in question.**" (Emphasis ours.)

In the case of **McCaughn, Collector of Internal Revenue, v. American Meter Company**, 72 F. 2d 871, the Court again affirmed its decision in the same case as was reported in 67 F. 2d 148, but extended its first decision, as follows:

"We think that the coin box devices used in connection with and attached to ordinary gas meters

constitute automatic slot-device vending machines, and that the coin box devices are taxable as such. The gas meters, however, to which the coin box devices were attached, although sold with the automatic slot-device vending machines, **are not, in our view, part of the taxable machines.** The fact that coin box devices are attached to the meters does not alter the character of the latter as ordinary gas meters. It is a simple and inexpensive matter to attach the coin box devices to, or disconnect them from, the gas meters. To tax gas meters merely because automatic slot-device vending machines are attached is no more reasonable than to tax service pipes or gas mains because they constitute part of the gas service system to which the automatic slot-device vending machines are attached. The District Court correctly construed our opinion when it held that the coin box devices were, but the gas meters were not, subject to tax." (Emphasis ours.)

This is exactly the same situation as exists in the case before us here. The facts of this case clearly show that the radios and the coin-slot machines which are attached thereto can be easily disconnected and separated. When so separated there is no license imposed by Section 613, supra, on the operator of the radio. It is only when the radio is connected with the coin-slot machine that the license is applied to the operator thereof, and then as a vending or coin-slot machine, a selling machine, and not as a radio. Further attention is called to the fact that under the agreed statement of facts on file in this case, and especially the diagrams of the coin-operated radios which are attached to such agreement (Record pp. 26 through 28D, inclusive), the mechanism of the coin-slot machine which is attached to these radios is very similar in operation to that of the coin-slot devices which were attached to the gas meters in the **McCaughn** cases, supra.

In this case, the coin-operated radio is plugged into the wall socket, and if a guest of the hotel desires to play the radio, he first has to buy enough electric current to play the radio, by inserting a twenty-five cent piece in the slot of the machine and designated as "T-231" (Record p. 28A). After he has done that the machine works automatically and by means of the mechanism situated within the coin device (Record p. 28B), the coin is automatically received into such device and starts the electric timer to running, which in turn automatically starts the electric current to flowing. The customer then is sold enough current to play the radio for approximately two hours. When the usual two-hour period has elapsed, then the timer automatically cuts off, and if the customer wishes to play the radio for a longer period, he must again insert another twenty-five cent piece and go through the same operation, whereupon he is again sold enough electric current to operate the radio for approximately another two hours. In other words, you have to buy the electric current, through the medium of the coin-slot machine, before you can play the radio. In substance, therefore, the facts of this case are practically identical to those in the two **McCaughn** cases, supra, and in which the Circuit Court of Appeals for the Third Circuit held that the tax in that case was not against gas meters, as such, but was against the coin-operated selling or vending machine attached thereto, and that when such a machine was attached to the gas meter, the entire contraption comprised a coin-operated slot machine. This is also true in this case, the radio, when taken separately, is not subject to the license, but when it is attached to the coin-slot selling or vending machine it becomes a part thereof and is subject to the license as a vending machine, and not in any respect as a radio.

In applying these principles to this case, it appears that under the doctrines of the cases which have just been

cited, and under the expressed wording of the statute itself, this license is clearly imposed on the operators of selling or vending machines, and not in any respect is it a tax on radios or radio receiving sets. The sale involved is both made and consummated within the limits of the City of Birmingham, and wholly within the boundaries of the State of Alabama. The absurdity of referring to these selling or vending machines as instruments of interstate commerce is patent.

III.

The License Involved Does Not Offend the Commerce Clause of the Federal Constitution.

The petitioner, Dorsky, in his brief in support of his petition in this cause contends as follows:

> "In holding that a privilege or occupational tax on such radio receiving sets is valid, the Supreme Court of Alabama (majority opinion) cited its opinion in the **Sanford v. City of Clanton** case, reported in 31 Ala. App. 253, 15 So. 2nd 303, and 15 So. 2nd 309, 'which is the prevailing rule on the question in this jurisdiction.' Subsequent to this decision, the Supreme Court of the United States apparently has overruled the **Sanford v. City of Clanton** case. **Spector Motor Service, Inc., v. O'Connor,** 71 S. Ct. 508. In this case the Supreme Court of the United States held that under the commerce clause, a state cannot levy a tax upon the privilege of carrying on a business that is exclusively **interstate in character,** no matter how fairly the tax is apportioned to business done within the state."

The fallacy of the petitioner's argument in this respect lies in the fact that he fails to recognize that the license

here involved is not a direct tax on radio receiving sets, but is in actual fact a business or occupational license required of the operators of vending machines, included among which are coin-operated radios. This fallacy is further manifested by the petitioner by his assuming for the purpose of his argument that in carrying on the business of installing, maintaining and operating these coin-in-the-slot vending machines or coin-operated radios in the three hotels in Birmingham, Alabama, that he is engaging solely in interstate commerce.

It is true that the franchise tax imposed by the State of Connecticut in **Spector Motor Service, Inc., v. O'Connor,** 340 U. S. 602, 71 S. Ct. 508, was declared by this Court to be invalid, because of the fact that it was stipulated and agreed that the taxpayer in that case was carrying on solely an interstate business. There was no disagreement about this in the **Spector Motor Service** case, as the parties thereto stipulated that Spector's business was solely interstate commerce. The evidence in that case was undisputedly to the effect that there was no intrastate features of Spector's business; thus, there was no possible basis for an apportionment in that case. In delivering the opinion Mister Justice Burton, however, noted that his opinion was:

> "• • • not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, the state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

The flaw of the tax under consideration, he said, was that it attached solely to the franchise of the petitioner to do interstate business.

There appears to be no conflict then in the doctrine of the **Spector Motor Service** case, and that expressed by the Court of Appeals of Alabama in **Sanford v. City of Clanton**, 31 Ala. App. 253, 15 So. 2d 303, certiorari denied 244 Ala. 671, 15 So. 2d 309, which doctrine has generally been accepted by the Supreme Court of Alabama, as stated in its opinion in the **Dorsky** case (51 So. 2d 360, 362).

Inasmuch as the Supreme Court of Alabama, in its majority opinion in this case (Record pp. 33 through 43, inclusive), based its decision on the **Sanford v. City of Clanton** case, supra, as to the alleged question of whether the Alabama license imposed on the operators of vending machines, as applied to coin-operated radios, offended the "commerce clause" of the Federal Constitution, it appears that a comprehensive examination of the **Sanford** case is necessary in order to completely understand the Court's decision on this point in the **Dorsky** case. For this reason, a copy of the Alabama Court of Appeals' opinion in the **Sanford** case, and as appearing in 15 So. 2d 309, is set out in full in Appendix "A" to this brief and argument.

The city ordinance of Clanton, Alabama, involved in the **Sanford** case reads as follows:

> "'74. Freight or Produce Delivery. Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Clanton, which said goods, wares, merchandise or produce was transported from a point without the City of Clanton to a point within the City of Clanton—
>
> "'Per year $25.00
> "'Per week 10.00
> "'Per day ..... 2.00'
>
> "That said ordinance was enacted by the City of Clanton for the purpose of raising revenue for the

use of said City of Clanton in paying its general expense and to maintain and exercise the police power of said City of Clanton, in the regulation of said Businesses, Professions, Vocations, or Callings. That the above section number 74 was one of the many schedules in said ordinance."

The appellant in that case was in the wholesale oil business, with a place of business located at De Funiak Springs, Florida. In the course of his business at Clanton, Alabama, an ice manufacturer and dealer, by wire, mail, or long distance telephone, ordered several truckloads of fuel oil from the appellant, Sanford, which were delivered on different occasions by Sanford and by his trucks to the ice manufacturer in Clanton, Alabama. On each of these occasions the appellant loaded his trucks from his oil tanks at De Funiak Springs, Florida, and trucked the oil into Alabama and delivered it from his trucks to the ice manufacturer within the City of Clanton, Alabama.

The license in that case was on the privilege of making deliveries within the city limits of Clanton, Alabama, which applied to all persons or concerns regardless of their point of origin, whether it was from a point in Alabama or not, and was imposed on the appellant, Sanford, in that case accordingly.

The Court of Appeals of Alabama in deciding that case, and in holding that the license was valid, and did not under the circumstances offend the "commerce clause" of the Federal Constitution, relied substantially on the doctrine of this Court as laid down in the majority opinion of the Court in the case of **Western Live Stock v. Bureau of Revenue**, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944.

As a complete copy of the opinion in the **Sanford** case, supra, has been attached to this brief and argument as

Appendix "A", the respondent will not for the sake of brevity go into the case in full detail. However, some pertinent excerpts from that decision are as follows:

> "But the design of the commerce clause was not to relieve those so engaged from their just share of state tax burdens, though the cost of doing business may thereby be increased. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823, 115 A. L. R. 944.
>
> " 'Even interstate business must pay its way' (Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. Ed. 590) is the shibboleth, and guides us here. **And, as we understand it, the taxing power of a state is not to be regarded as having been exercised in an unconstitutional manner where the levy is non-discriminatory in character, does not materially impede the commerce, and is not subject to local levy in some other sovereignty.** State of Alabama v. Coca-Cola Bottling Works, 29 Ala. App. 508, 511, 198 So. 363; King & Boozer v. State, 241 Ala. 557, 3 So. 2d 572, 579; Johnston v. State, 16 Ala. App. 425, 78 So. 419; Wagner v. City of Covington, 251 U. S. 95, 102, 104, 40 S. Ct. 93, 64 L. Ed. 157, 168; Ward Baking Co. v. Federal Trade Comm., 9 Cir., 264 F. 330; Howe Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; Emert v. Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. Ed. 1043; Southern Pac. Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944.
>
> "It is also to be remembered that the consecration to Congress of regulatory power by the commerce clause was not—and is not—wholly proscriptive of state power to regulate matters of purely local con-

cern with respect to which Congress has not exercised its power, although interstate commerce might be thus affected. State of California v. Thompson, 313 U. S. 109, 113, 61 S. Ct. 930, 85 L. Ed. 1219.

"The point was emphasized in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 46, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876, that not all state taxation is to be condemned because in some manner its tendency is to affect interstate commerce."

The modern trend of this Court concerning what might be considered a proper tax where interstate commerce is involved started, for all practical purposes, in 1938 with Chief Justice Stone's decision in the case of **Western Live Stock v. Bureau of Revenue**, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823.

Under the doctrine of that case which is relied upon by the Alabama Courts in the **Sanford** case, supra, taxes on interstate commerce were said to be invalid only if there was a real risk of multiple taxation not borne by local commerce.

From 1938 to 1946 it appears that if a reasonable apportionment method was used, a state tax on receipts, income, or property of interstate commerce would be upheld.

The majority opinion written by Mister Justice Frankfurter in **Freeman v. Hewitt**, 329 U. S. 249, 67 S. Ct. 274, decided December 16, 1946, changed this situation, in that the Court reverted to its earlier view of examining into the taxing act to ascertain whether a local or interstate activity was being carried on and, if interstate, whether the tax was direct or indirect.

Starting again in 1947 the Court seems to have again recognized the principle of the **Western Live Stock v. Bureau of Revenue** case, supra, in that several recent cases show that trend.

In **Central Greyhound Lines of N. Y. v. Mealey**, 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633, the Court, by a six to three vote, struck down a New York tax on the gross receipts on a journey between two points in New York where approximately one-half of the journey was through New Jersey and Pennsylvania. As applied, the tax was not apportioned. However, the Court clearly indicated that if apportioned the tax would be proper. On remander the New York Court of Appeals read into the otherwise silent statute an apportionment based on mileage within and without the state.

In **Memphis Natural Gas Company v. Stone**, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832, the Court upheld a Mississippi franchise tax measured by capital employed in the state, on a pipe line company which transported gas from Louisiana through Arkansas and Mississippi to Tennessee. The taxpayer had one wholesale customer in the state. Its employees were only those necessary to maintain its line.

In the case of **Ott v. Mississippi Valley Barge Line Company**, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, the Court upheld, by an eight to one vote, Louisiana and New Orleans ad valorem taxes on vessels which journeyed up and down the Mississippi River and unloaded and loaded at New Orleans. The taxes were apportioned on a mileage basis.

In these three cases illustrating property, franchise, and gross receipts taxes, this Court has upheld state taxes which a decade or so earlier would have been stricken down as direct taxes on interstate commerce.

The **Greyhound** opinion pointed out that the vice of the New York tax was that the total receipts from the interstate journey were taxed, rather than the receipts from only the fifty-seven per centum of the journey in New York. The Court pointed out that if New York could

tax all, that Pennsylvania and New Jersey could do likewise. It suggested that the tax be fairly apportioned and remanded the case for that purpose, which was done. This opinion seems to mean that a gross receipts tax on "interstate commerce" was valid if properly apportioned and that the tax would not have to be "imposed in lieu of" a property tax.

The **Memphis** decision shortly thereafter made it clear that a non-discriminatory tax on the privilege of doing an exclusively interstate business is constitutionally valid if properly apportioned. The plurality opinion covers the whole field. It recognizes that it was not enough to find some local activity (such as ownership and maintenance of the pipe line) but held that even if such activity was essential to do an interstate business, it still could be taxed. This is a considerable extension. Analyzed out, the **Memphis** case appears to uphold the tax statute—if properly drawn—on interstate businesses which regularly maintain property used exclusively in interstate commerce.

The eight to one decision in the **Ott** case makes it look as if the "multiple tax" theory has once again prevailed. In applying the early railroad cases to intrastate vessels (**Main v. Grand Trunk R. R. Co.**, 142 U. S. 217, 12 S. Ct. 163, 35 L. Ed. 994), the Court stated:

> "Moreover, that tax, like taxes on property, taxes on activities confined to the taxing state, or taxes on gross receipts apportioned to the business carried on there, has no cumulative effect, caused by the interstate character of the business. Hence there is no risk of multiple taxation. Finally, there is no claim in this case that Louisiana's tax discriminates against the interstate commerce."

The case of **Interstate Oil Pipe Line Company v. Stone**, 337 U. S. 662, 69 S. Ct. 1264, decided June 20, 1949, appears

to be in fact a companion to the **Memphis Natural Gas Company v. Stone** case, supra. Both cases arose out of Mississippi statutes imposing a tax on the "privilege" of doing business in the state. This Court in the **Interstate Oil Pipe Line Company** case, supra, in the majority opinion, upheld a judgment of the Supreme Court of Mississippi, holding that a tax imposed on a pipe line company and measured by a percentage of its gross income for convenience was on the privilege of operating a pipe line wholly within the state and was valid as a tax on the privilege of doing an intrastate business.

In upholding the validity of the tax this Court held that the tax did not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation made apportionment unnecessary; that there was no attempt to tax interstate activities carried on outside Mississippi's boundaries, nor could any other state repeat the tax. For these reasons the commerce clause did not invalidate the tax.

In the companion cases, **Canton R. Co. v. Rogan,** 340 U. S. 511, 71 S. Ct. 447, 95 L. Ed. 334, and **Western Maryland Railway Co. v. Rogan,** 340 U. S. 520, 71 S. Ct. 450, 95 L. Ed. 339, these common carriers challenged the constitutionality of a franchise tax imposed by the State of Maryland measured by the gross receipts of the companies apportioned to the length of their lines within the state. The carriers claimed that the revenues or gross receipts by which the tax was measured represented revenues from the transportation over their lines of exports and imports and were beyond the state's powers to tax. It is also well to note that in making these hauls the carriers both delivered the freight involved to the ships to be transported in foreign commerce on the one hand, and received cargo from the ships to be transported and delivered in

this country on the other hand. In deciding the **Canton Railroad Company** case, 71 S. Ct. 447, and at page 449, the Court concluded:

> "The objection to Maryland's tax on the ground that interstate commerce is involved is not well taken. It is settled that a non-discriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state, see Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 255, 58 S. Ct. 546, 548, 82 L. Ed. 823, and not reaching any activities carried on beyond the borders of the state. Where transportation is concerned, an apportionment according to the mileage within the state is an approved method. Central Greyhound Lines of N. Y. v. Mealey, 334 U. S. 653, 663, 68 S. Ct. 1260, 1266, 92 L. Ed. 1633. Affirmed."

It also summarizes in the **Western Maryland Railway Company** case, 71 S. Ct. 450, at page 451, as follows:

> "Here we have transportation of exports and imports to and from the port. If Maryland were required to grant tax immunity to the services involved in getting the exports to the port and the imports to their destination, so would any other State. The ultimate impact of such a holding is difficult to measure, since manifold services are involved in the movement of exports and imports within the country. Problems of this nature, like many problems in the law, involve the drawing of lines. So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge."

It is also interesting to note that in these cases the Court based its decision, at least in part, on the "multiple tax,"

and apportionment principle of its earlier decision in the **Western Live Stock v. Bureau of Revenue** case, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823. In fact, in arriving at its conclusion in the **Canton Railroad** case (71 S. Ct. 447, 449), the Court cites the **Western Live Stock** case in support thereof.

Here, also, the facts were very similar and the reasoning almost parallel to that in the case of **Sanford v. City of Clanton,** 31 Ala. App. 253, 15 So. 2d 303, certiorari denied, 244 Ala. 671, 15 So. 2d 309, on which the Supreme Court of Alabama (by a majority of five to one) relied in deciding that the license on the operators of coin-operated radios here involved was valid. While the license involved in the **Sanford v. City of Clanton** case, supra, was on the transporter or trucker for the privilege of making deliveries in the City of Clanton, Alabama, the incident of the license tax was on the delivery made by such persons or concerns within the city limits.

In holding in the **Canton Railroad Company** and **Western Maryland Railway** cases that, "* * * the line must be drawn at the water's edge," we believe that the Court contemplated a delivery to the ship as an incident or component part of the haul or movement within the State of Maryland, and by which the apportionment was made.

This point considered, it appears that the Court in its very latest decisions has strengthened and affirmed the doctrine of the case of **Sanford v. City of Clanton,** 31 Ala. App. 253, 15 So. 2d 303, certiorari denied, 244 Ala. 671, 15 So. 2d 309, rather than overruling that case, as is suggested by the petitioner, Dorsky.

It also seems to have reaffirmed the doctrine of the case of **Western Live Stock v. Bureau of Revenue,** 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, on which the decision in the **Sanford** case is mainly based.

The dissenting opinion of the Chief Justice of the Alabama Supreme Court in the case at bar, upon which the petitioner, Dorsky, strongly relies, appears to have been based in large part on the doctrine of this Court in **Freeman v. Hewitt,** 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 263, and those cases which support the so-called "direct-indirect" test. The Honorable Chief Justice, for whom the writer has the highest regard and esteem, seems, however, to have completely overlooked the more recent cases, and the return of this Court to the "multiple tax" test, and principle of apportionment, as is manifested in the more recent cases, namely, **Central Greyhound Lines of New York v. Mealey,** 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633; **Memphis Natural Gas Company v. Stone,** 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832; **Ott v. Mississippi Valley Barge Line Company,** 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585; **Interstate Oil Pipe Line Company v. Stone,** 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613; **Canton Railroad Company v. Rogan,** 340 U. S. 511, 71 S. Ct. 447, 95 L. Ed. 334; **Western Maryland Railroad Company v. Rogan,** 340 U. S. 520, 71 S. Ct. 450, 95 L. Ed. 339; and **Spector Motor Service, Inc., v. O'Connor,** 71 S. Ct. 508.

This return to the doctrine of the **Western Live Stock Company** case, supra, was certainly not weakened by the Court's opinion in **Spector Motor Service, Inc., v. O'Connor,** supra, but was strengthened. The majority of the Court, speaking through Mister Justice Burton, made this clear (71 S. Ct. 508, 512):

> "Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe

Line Co. v. Stone, supra; International Harvester Co. v. Evatt, 329 U. S. 416, 67 S. Ct. 444, 91 L. Ed. 390; Atlantic Lumber Co. v. Com'r of Corporations and Taxation, 298 U. S. 553, 56 S. Ct. 887, 80 L. Ed. 1328. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel. Central Greyhound Lines v. Mealey, 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633, or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823. See also Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832."

The Chief Justice of the Alabama Supreme Court, in his dissenting opinion in the **Dorsky** case, made the following observations:

> "The tax here involved is levied on the business of operating instrumentalities of reception rather than the business of broadcasting. No attempt is made in section 613, supra, to apportion the tax or to separate intrastate communications from interstate communications and to levy the tax on intrastate communications only. So in that respect, we are bound to consider the levy as one on interstate communications, or on the business of operating instrumentalities used in interstate communications.
>
> "As we understand the Fisher's Blend case, supra, it was not held that all broadcasting was interstate commerce, but that as the tax was levied on the gross income, which included that from interstate commerce, it followed that it was an unauthorized tax levied on interstate commerce."

The five Justices who wrote the per curiam or majority opinion in this case (51 S. 2d 360), seem clearly to be of the opinion that the petitioner, Dorsky, was carrying on

a purely local or intrastate business in operating these vending machines in the three local hotels in Birmingham, Alabama, which was entirely separate and distinct from interstate commerce, or the transmission or reception of radio communications.

This Court has also in at least two recent decisions recognized the principle that where a person is engaged in a business comprised of both intrastate and interstate activities, a privilege tax may be imposed on or measured by the receipts of the purely intrastate part of the business, where it is possible to separate the two and a fair apportionment made, even though the taxing statute is otherwise silent as to apportionment.

Moreover, it appears that where the privilege tax is imposed on the purely local or intrastate features of such business and is to be measured thereby, that is a proper apportionment, without any further provision for apportionment being necessary in the taxing statute.

In the **Interstate Oil Pipe Line Company v. Stone** case, 337 U. S. 662, 69 S. Ct. 1264, this Court, in upholding a Mississippi tax on the privilege of operating a pipe line solely within the State of Mississippi, held that it was not necessary under the circumstances for any apportionment to be made where the tax was on the privilege of conducting purely an intrastate part of the business, and which was measured by two per centum of the gross income from such activities in Mississippi. This was true, even though the pipe line also ran through the States of Louisiana, Tennessee, and Arkansas. Mister Justice Rutledge in speaking for the majority in that case (69 S. Ct. 1264, at page 1267) concluded:

> "Since all activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature

of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activities carried on outside Mississippi borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate the tax."

While in the case of **Central Greyhound Lines of New York v. Mealey,** 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633, the Court struck down a New York tax on gross receipts between two points in New York, it did so because at least one-half of the journey was through the states of New Jersey and Pennsylvania. As first applied in that case there was as a practical matter no apportionment, as the complete journey was taken into consideration in computing the tax. In its opinion in that case, this Court clearly indicated that if the tax was apportioned to the gross receipts derived from that part of the mileage or the journey in New York, the tax would be proper. On remander the New York Court of Appeals read into the otherwise silent statute an apportionment based on mileage both within and without the state. Apparently such apportionment has been sustained.

It, therefore, appears that the criticism made in the dissenting opinion in the case at bar, that the Alabama Legislature in amending Title 51, Section 613, Code of Alabama 1940, as amended by House Bill No. 688, General Acts of Alabama 1947, page 522, 1949 Cumulative Pocket Part, Alabama Code of 1940, page 183, to include among the other coin-operated vending machines described in the statute, coin-operated radios, failed to provide for a proper apportionment is without merit.

On this point it might be said that the **Dorsky** case is the antithesis of the **Spector Motor Service, Incorporated,** case (71 S. Ct. 508). In the **Spector Motor Service, Incorporated** case, supra, it was pointed out by the Court that Spector's business was wholly an interstate business. In this case it is apparent that the business of the peti-

tioner, Dorsky, is wholly intrastate or local in nature. No part of Dorsky's business transcends the limits of the City of Birmingham, Alabama, much less the boundaries of the State of Alabama. The license here involved, while imposed on the operator of the machine, is measured by the number of vending machines or coin-operated radios which the petitioner, Dorsky, or any other person for that matter, operates in hotels, motels, tourist courts or other public places in Alabama.

The Alabama Legislature has not under Section 613, supra, or otherwise, made an attempt to impose this license outside of the boundaries of the State of Alabama. The statute especially provides that it is to have only local application.

Under the circumstances there is nothing to apportion. Also, as Dorsky's business activities are confined wholly within the city limits of Birmingham, Alabama, there is not even the remotest possibility of any other state taxing such activities.

The case of **Station W.B.T. v. Poulnot,** 46 Fed. 2d 671, has no bearing on this case. The facts of that case are clearly distinguishable from the facts involved in the case at bar. The South Carolina statute before the District Court in that case (Act S. C. March 31, 1930 [36 St. at Large, p. 1292]) was a privilege tax on all radio receiving sets, regardless of where installed, and included all radio receiving sets whether in use in private homes or not. It was not a business or occupational license.

The Alabama license involved here is a business or occupational license on the operators of vending or coin-in-the-slot machines, and is not on the operators of radio receiving sets.

McCaughn, Collector of Internal Revenue, v. American Gas Meter Company, 67 F. 2d 148, 72 F. 2d 871.

The incident of the license in this (Dorsky) case is on those persons who are engaged in the business of operating, or who are making a profit from operating, vending or coin-operated machines. There is absolutely no attempt made to tax radio receiving sets or radio communications in any respect.

Notwithstanding the cases of **Fisher's Blend Station, Incorporated, v. Tax Commission**, 297 U. S. 650, 56 S. Ct. 608, 80 L. Ed. 956; **Beard v. Vinsonhaler**, 215 Ark. 389, 221 S. W. 2d 3, certiorari denied 338 U. S. 863, 94 L. Ed. 529; **Albuquerque Broadcasting Company v. Bureau of Revenue**, 51 N. Mex. 332, 184 P. 2d 416, 11 A. L. R. 2d 966, are clearly to the effect that local or intrastate incidents of the radio broadcasting business may be taxed or licensed by a state where incidents can be separated from the interstate incidents, and confined to the broadcasting business or activities within the taxing state.

It is also interesting to note that in so holding in the **Vinsonhaler** case (221 S. W. 2d 3, at page 4), the Arkansas Supreme Court also based its opinion mainly on the decision of this Court in **Western Live Stock v. Bureau of Revenue**, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944.

In the **Vinsonhaler** case, supra, counsel for the broadcasting company cited practically the same cases as have been used by counsel for the petitioner, Dorsky, in this case, namely, **Fisher's Blend Station v. Tax Commission**, supra; **Pacific Telephone and Telegraph Company v. Tax Commission**, 297 U. S. 403, 56 S. Ct. 522; **Station W. B. T., Incorporated, v. Poulnot**, 46 F. 2d 671, among others.

The Arkansas Supreme Court in discussing the **Pacific Telephone and Telegraph Company** case, supra, in relation to the **Vinsonhaler** case, supra, quoted from the **Pacific Telephone and Telegraph Company** case as follows:

> "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

Following such quotation from the **Pacific Telephone and Telegraph Company** case, supra, the Arkansas Supreme Court reasons as follows:

> "Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activities."

In commenting on the **Fisher's Blend Station, Incorporated, v. Tax Commission** case, supra, the Court also observed that in that case, which was strongly urged by the appellant (radio station), that this Court was careful not to say that a tax upon the generation of radio impulses would be invalid. This point was reserved by this Court in the **Fisher's Blend Station, Incorporated,** case by the following language:

> "Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its business, it is entirely unnecessary to decide."

CONCLUSION.

In concluding it is submitted that the license in this case meets the test of both the "multiple tax" doctrine of **Western Live Stock v. Bureau of Revenue,** 303 U. S. 250, 58

S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944, and the large number of recent decisions of this Court which have affirmed that doctrine, and also the "direct-indirect" test of **Freeman v. Hewitt**, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 263, which apparently has been overruled. This is true because, under the facts of this case, the petitioner Dorsky has been carrying on a purely local and intrastate business in operating his vending machines or coin-operated radios in the three hotels located within the city limits of Birmingham, Alabama. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM H. BURTON,
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Counsel for Respondent.

APPENDIX "A."

COURT OF APPEALS OF ALABAMA.

June 30, 1943.

5 Div. 178.

Sanford

vs.

City of Clanton.

Appealed from Circuit Court of Chilton County, Alabama.

Rehearing Denied Aug. 10, 1943.

Simpson, Judge.

Action by Fred L. Sanford, doing business as Sanford Service Station, against the City of Clanton, to recover money paid as a license tax, under protest. From a judgment for defendant, plaintiff appeals.

Affirmed.

Certiorari denied by Supreme Court in Sanford v. City of Clanton, 15 So. 2d 309.

The case was tried upon an agreed stipulation of facts as follows:

"Stipulation of Facts.

"It is the desire of the parties to the aforementioned suit to submit to the Court the exemption vel non of the Plaintiff from the payment of the license tax of $2.00 and a fee of .50¢ collected from the plaintiff on the 25th day of March, 1941, and the payment of the license tax of $2.00, and a fee of .50¢ collected

from the plaintiff on the 23rd day of May, 1941. Each of said items of license tax being for the privilege of doing business as hereinafter stated. The plaintiff claims an exemption from payment of said tax for the reason that the business transactions which he conducts within the corporate limits of the City of Clanton, Alabama, were of interstate character. The defendant herein admits that such transactions were entirely interstate. It is further the desire of the parties hereto, to submit this case expeditiously and to save as much cost as might be reasonably possible. Therefore, it is agreed as follows:

"(1) That this case may be submitted at any time for judgment of the Court without waiting for the same to be called at the regular term of said Court.

"(2) That in the event that if either of the parties to this case perfects an appeal to the Circuit Court of Chilton County, Alabama, that the parties to this cause agree that this cause may be submitted for judgment of said Circuit Court without waiting for the same to be called at the regular term of said Court, and a trial by Jury in said Court is hereby waived.

"(3) If Plaintiff was exempt from the license tax, hereinafter mentioned, then he is entitled to recover the sum of $5.00 with lawful interest from the respective dates on which he paid each of said sums of $2.50, and his reasonable costs, and if plaintiff is not entitled to such exemption then the defendant is entitled to judgment, with its reasonable cost.

"That the facts involved in this cause are as set forth above and in the following agreed statement of facts.

"Agreed Statement of Facts.

"(A) Plaintiff is a resident of the State of Florida and was such resident during all of the year of 1941, and to the date hereof.

"(B) That defendant, City of Clanton, is a municipal corporation organized and existing under the laws of Alabama.

"(C) That plaintiff, during all the year of 1941 and to and including the date of the filing of the suit in this cause, was doing business in De Funiak Springs, Florida, as a Wholesale Oil Dealer, and sold gasoline and kindred products, including fuel oil, in De Funiak Springs, Florida, from which point he did deliver such products by his own trucks as originally loaded in Florida to purchasers at various points outside the State of Florida, upon orders transmitted by mail, telegram or telephonic communication, as hereinafter set out.

"(D) That two or three days prior to the 25th day of March, 1941, one James Wade, doing business as Clanton Ice Company, in the City of Clanton, Alabama, by mail, telegram or telephonic communication ordered of the plaintiff at De Funiak Springs, Florida, one truck load of fuel oil delivered to the place of business of the said James Wade in Clanton, Alabama, and that said order was accepted by the plaintiff in De Funiak Springs, Florida, having been forwarded from Clanton, Alabama, either by mail, telephone, or telegraph, and that thereafter and on the 25th day of March, 1941, the plaintiff transported from De Funiak Springs, Florida, and delivered one truck load of fuel oil in his own truck, as originally loaded, to the said James Wade, purchaser, doing business as Clanton Ice Company, within the corporate limits of the City of Clanton, Alabama, and that such delivery was made

pursuant to said order theretofore given by said purchaser, and transmitted to and accepted by the plaintiff in De Funiak Springs, Florida, either by mail, telephone, or telegraph, as above set forth, which order originated in Alabama, and that such delivery was made by plaintiff's truck, as originally loaded, and no other deliveries were made from plaintiff's truck, either in Alabama or in the City of Clanton, Alabama, on said trip of said truck from De Funiak Springs, Florida, to Clanton, Alabama.

"(E) That two or three days prior to the 23rd day of May, 1941, one James Wade, doing business as Clanton Ice Company, in the City of Clanton, Alabama, by mail, telegram or telephonic communication ordered of the plaintiff at De Funiak Springs, Florida, one truck load of fuel oil to be delivered to the place of business of the said James Wade in Clanton, Alabama, and that said order was accepted by the plaintiff in De Funiak Springs, Florida, having been forwarded from Clanton, Alabama, either by mail, telephone or telegraph, and that thereafter and on the 23rd day of May, 1941, the plaintiff transported from De Funiak Springs, Florida, and delivered one truck of fuel oil in his own truck, as originally loaded, to the said James Wade, purchaser, doing business as Clanton Ice Company, within the corporate limits of the City of Clanton, Alabama, and that such delivery was made pursuant to said order theretofore given by said purchaser, originating in Alabama, and transmitted to and accepted by the plaintiff in De Funiak Springs, Florida, either by mail, telephone or telegraph, as above set forth and that such delivery was made by plaintiff's truck, as originally loaded, and no other deliveries were made from plaintiff's said truck either in Alabama or in the City of Clanton, Alabama, on said trip of said truck from De Funiak Springs, Florida, to Clanton, Alabama.

"(F) That the fuel oil delivered by plaintiff on the dates aforesaid, in the year 1941, was consumed by the purchaser in his manufacturing operations within the corporate limits of the defendant's corporation.

"(G) That the defendant, City of Clanton, Alabama, at the time of such deliveries, as described in paragraphs D and E hereof, and from January 1, 1941, and at all times until the filing of this suit, had in full force and effect a validly enacted ordinance, enacted by the City Council of the City of Clanton, which fixed and prescribed a license schedule for the City of Clanton, Alabama, and the police jurisdiction thereof, and by said validly enacted ordinance had imposed a privilege license or occupational tax for doing business within the corporate limits of the City of Clanton, Alabama, and the police jurisdiction thereof, in the following manner:

" '74. Freight or Produce Delivery. Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Clanton, which said goods, wares, merchandise or produce was transported from a point without the City of Clanton to a point within the City of Clanton—

" 'Per year $25.00
" 'Per week 10.00
" 'Per day ..... 2.00'

"That said ordinance was enacted by the City of Clanton for the purpose of raising revenue for the use of said City of Clanton in paying its general expense and to maintain and exercise the police power of said City of Clanton, in the regulation of said Businesses, Professions, Vocations, or Callings. That the above

section number 74 was one of the many schedules in said ordinance.

"(H) That had the orders, mentioned in paragraphs D and E, hereof, been transmitted in the manner set forth (paragraphs D and E) to plaintiff to a point in Alabama and the deliveries of fuel oil pursuant thereof originated from a point in Alabama, the plaintiff would have been subject to the license tax and fee which he paid.

"(I) The plaintiff, pursuant to the demand of the defendant, paid to the defendant, City of Clanton, under duress and lawful protest, on said March 25, 1941, $2.50 above set forth, and on May 23, 1941, $2.50 above set forth, as a tax and fee for the privilege for conducting his business operations in the manner outlined in paragraphs D and E hereof, in the corporate limits of defendant corporation, during the year 1941; and it is admitted by the plaintiff that collection of said tax would have been lawfully authorized, had the transactions carried on by the plaintiff been of intrastate character.

"(J) The license tax, $2.00 per day plus a fee of 50¢ for the issue of said license was reasonably apportioned to the revenues derived from sales and deliveries as described in paragraphs D and E hereof."

J. B. Atkinson, of Clanton, for appellant.

Lawrence F. Gerald and Gerald & Gerald, all of Clanton, for appellee.

Simpson, Judge.

The question is whether Section 74 of the privilege license ordinance of the City of Clanton, as applied to appellant, infringes the commerce clause of the Federal Constitution, Article 1, Section 8, cl. 3.

The challenged schedule is made applicable to all who engage in such business within the corporate limits of the municipality.

Purpose of the ordinance is the "raising (of) revenue for the use of said City of Clanton in paying its general expense and to maintain and exercise the police power of said City of Clanton, in the regulation of said Businesses, Professions, Vocations, or Callings."

The tax imposed for issuance of the license prescribed in said section was reasonably apportioned to the business done by appellant. It is admitted that had the transactions involved been exclusively intrastate the tax would have been lawfully authorized.

(1) Quite manifestly the levy is non-discriminatory in character.

But appellant is a wholesale dealer of motor fuel, with place of business in Florida, and on several occasions, upon receipt of an order by mail, telegraph or telephone from a local ice dealer in Clanton, shipped and delivered in his own truck a load of fuel oil from his Florida warehouse to the Clanton dealer. No other deliveries were made from the truck thus consigned, after it began its interstate journey.

All deliveries are, concededly, subject to the tax except insofar as they, allegedly, infringe the commerce clause which declares that "the Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *." Constitution, Article 1, Section 8.

(2, 3) We approach a decision of the question in the light of the recognized fact that there is the superior right of the state to levy taxes for state purposes, and

only when such imposts have the effect to regulate interstate commerce to an extent which infringes the authority conferred upon Congress by constitutional prescription is such a tax conceived to transcend constitutional limitations. Gibbons v. Ogden, 9 Wheat. 1, 187, 6 L. Ed. 23; South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 185, 625, 58 S. Ct. 510, 82 L. Ed. 734. Consonant with this general principle, those taxes which tend to obstruct or discriminate against the commerce have been denounced as infringement of constitutional authority.

(4) But the design of the commerce clause was not to relieve those so engaged from their just share of state tax burdens, though the cost of doing business may thereby be increased. Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 254, 58 S. Ct. 546, 548, 82 L. Ed. 823, 115 A. L. R. 944.

(5) "Even interstate business must pay its way" (Postal Telegraph-Cable Co. v. Richmond, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. Ed. 590) is the shibboleth, and guides us here. And, as we understand it, the taxing power of a state is not to be regarded as having been exercised in an unconstitutional manner where the levy is nondiscriminatory in character, does not materially impede the commerce, and is not subject to local levy in some other sovereignty. State of Alabama v. Coca-Cola Bottling Works, 29 Ala. App. 508, 511, 198 So. 363; King & Boozer v. State, 241 Ala. 557, 3 So. 2d 572, 579; Johnston v. State, 16 Ala. App. 425, 78 So. 419; Wagner v. City of Covington, 251 U. S. 95, 102, 104, 40 S. Ct. 93, 64 L. Ed. 157, 168; Ward Baking Co. v. Federal Trade Comm., 9 Cir., 264 F. 330; Howe Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; Emert v. Missouri, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604, 58 S. Ct. 736, 82 L. Ed. 1043; Southern Pac. Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed.

586; Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944.

(6) It is also to be remembered that the consecration to Congress of regulatory power by the commerce clause was not—and is not—wholly proscriptive of state power to regulate matters of purely local concern with respect to which Congress has not exercised its power, although interstate commerce might be thus affected. State of California v. Thompson, 313 U. S. 109, 113, 61 S. Ct. 930, 85 L. Ed. 1219.

The point was emphasized in McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 46, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876, that not all state taxation is to be condemned because in some manner its tendency is to affect interstate commerce. It was there said: Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. (1) A tax may be levied on net income wholly derived from interstate commerce. (2) Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited. (3) The like taxation of property, shipped interstate, before its movement begins, or (4) after it ends, is not a forbidden regulation. (5) An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or (6) withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Following are cited, respectively, as sustaining authorities: (1) United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918 E, 748; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed.

165; Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051; Matson Navigation Co. v. State Board, 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791; (2) Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 17 S. Ct. 305, 41 L. Ed. 683; Wells Fargo & Co. v. Nevada, 248 U. S. 165, 39 S. Ct. 62, 63 L. Ed. 190; St. Louis & E. St. L. Electric R. Co. v. Missouri, 256 U. S. 314, 41 S. Ct. 488, 65 L. Ed. 946; Southern Ry. Co. v. Watts, 260 U. S. 519, 43 S. Ct. 192, 67 L. Ed. 375; (3) Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615; Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; State of Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131; (4) Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257; Pittsburgh & Southern Coal Co. v. Bates, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538; General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754; (5) Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622; Chassaniol v. Greenwood, 291 U. S. 584, 54 S. Ct. 541, 78 L. Ed. 1004; Eastern Air Transport v. South Carolina Tax Commission, 285 U. S. 147, 52 S. Ct. 340, 76 L. Ed. 673; Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831; Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; Edelman v. Boeing Air Transport, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155.

In all these cases the local tax, concededly, in some measure, affected the commerce or added to its cost, yet was sustained.

(7) The tax here under consideration is laid upon all alike. A wholesale dealer of such products in Florence or Mobile, Alabama, is as equally subject to the tax for

the transaction of like business, so it is no argument in condemnation of the tax that every city in the State could institute a similar levy. Such contention is inapposite. The test is: Does the tax have a tendency to prohibit the commerce or place it at a disadvantage as compared to or in competition with intrastate commerce? McGoldrick v. Berwind-White Coal Mining Co., supra. Clearly it does not.

We discern no distinction in the principle or rationale between the case at bar and McGoldrick v. Berwind-White Coal Mining Co., supra, where was upheld the New York City sales tax, making the foreign vendor the guarantor of the tax laid upon all purchases within the state of goods for consumption, regardless of whether transported in interstate commerce. Pertinent here is the observation there, with reference to that tax (309 U. S. 33, 60 S. Ct. 394, 84 L. Ed. 565, 128 A. L. R. 876): "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce sustained in Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141; Henneford v. Silas Mason Co., supra (300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488; Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389, 83 L. Ed. 586, or the tax on storage or withdrawal for use by the consignee of gasoline, similarly sustained in Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 S. Ct. 631, 76 L. Ed. 1232, 84 A. L. R. 831; Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; Edelman v.

Boeing Air Transport, 289 U. S. 249, 53 S. Ct. 591, 77 L. Ed. 1155, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. Brown v. Houston, supra; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538."

(8) Says the learned Justice in that case: "Equality is its theme * * *. It does not aim at or discriminate against interstate commerce." And so say we here, as to the instant tax. We fail to perceive that the present license tax discriminates against or impedes interstate commerce more than numerous other state and local taxes heretofore sustained as not impinging upon the commerce clause.

In McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584, the New York City sales tax was also sustained as to sales of merchandise for which orders, taken within the city and subject to approval of out of state vendors, were delivered by direct interstate shipment to purchasers thereof in the city.

And in our own State we have held that a license or privilege tax on soft drink wholesalers does not, as applied to a Mississippi manufacturer selling at wholesale to retail dealers in Alabama, from trucks proceeding from a Mississippi warehouse, impose on "interstate commerce" such multiple or discriminatory burdens as to render the tax unconstitutional. State v. Coca-Cola Bottling Works, 29 Ala. App. 508, 198 So. 363.

Likewise, our Supreme Court has ruled that an ordinance levying a privilege license tax against persons making deliveries of motor fuels to stations for retail within a city was not discriminatory and not subject to condemnation under the commerce clause as applied to an out of state dealer. City of Enterprise v. Fleming, 240

Ala. 460, 199 So. 691, 692. It was there said: "The privilege taxed is the privilege of delivering within the corporate limits, and no question of interstate commerce is involved."

If that holding is sound—and it seems to be—certainly the privilege here taxed is the same privilege of delivering, etc., within the corporate limits of Clanton, and is, likewise, not within the proscriptions of the commerce clause.

Or, adopting the rationale with which the distinguished Justice (now Chief Justice) concluded the Berwind-White opinion, supra: Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce.

It is stressed in argument that the tax should be condemned upon authority of the opinion of our Supreme Court in City of Roanoke v. Stewart Grocery Co., 235 Ala. 23, 176 So. 820, where a wholesale grocery corporation located in a foreign state, which solicited orders in the state through salesmen from retailers, and which made regular grocery deliveries by truck, was declared to be engaged exclusively in "interstate commerce", the holding being that a city ordinance attempting to impose a license or tax on such wholesaler for so taking or receiving orders (for the purpose of raising revenue) was in violation of the commerce clause.

This decision was rested upon the rule of Robbins v. Taxing District of Shelby County, 120 U. S. 489, 7 S. Ct.

592, 30 L. Ed. 694, and others. But, as was pointed out in McGoldrick v. Berwind-White Coal Mining Co., supra, the principle has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for purchase of goods to be shipped interstate, 309 U. S., at page 57, 60 S. Ct., at page 398, 84 L. Ed. 565, 128 A. L. R. 876. See also Ficklen v. Taxing Dist. of Shelby County, 145 U. S. 1, 12 S. Ct. 810, 36 L. Ed. 601; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; Wagner v. Covington, 251 U. S. 95, 104, 40 S. Ct. 93, 64 L. Ed. 157, 168.

If the Roanoke decision was intended to have wider application, it of course cannot be regarded as controlling authority in view of recent Federal Supreme Court decisions on the question. We think, however, such was not intended. See McCarter v. City of Florence, 213 Ala. 367, 104 So. 806, and other cases therein cited which limit the application of the principle, as aforesaid.

(9) The interpolation is perhaps unnecessary that the regulatory power of the State and its various municipalities is not subject to distinguishment under the authorities. The applicable principles control each and both alike.

We have tendered that careful study which the importance of the question merits and conclude that the lower court ruled correctly in sustaining the validity of the tax. Of consequence, the judgment appealed from is affirmed.

Affirmed.

244 Ala. 671.

Fred L. Sanford, etc.,

v.

City of Clanton,
5 Div. 382.

Supreme Court of Alabama
Oct. 7, 1943.

Rehearing Denied Oct. 28, 1943.

Certiorari to Court of Appeals.

J. B. Atkinson, of Clanton, for the petitioner.

Lawrence F. Gerald and Gerald & Gerald, all of Clanton, opposed.

Foster, Justice.

Petition of Fred L. Sanford, doing business under the firm name and style as Sanford Service Station, for certiorari to the Court of Appeals to review and revise the judgment and decision of that Court in the case of Sanford, etc., v. City of Clanton, 15 So. 2d 303.

Writ denied.

All the Justices concur.